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No. 91-1424

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HONG KONG ISLANDS LINE AMERICA, S.A.,
a corporation,
Petitioner,
vs.
C-ART, LTD.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an ocean carrier can be held liable for misdelivery, where the carrier delivers goods to the buyer without surrender of the original, properly endorsed bills of lading, in contravention of the express terms of the contract of carriage, *i.e.*, the bills of lading?

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a corporation,
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vs.
C-ART, LTD.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent C-ART, LTD. ("C-Art"),[1] successful plaintiff and respondent below, opposes the request for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed herein by petitioner HONG KONG ISLANDS LINE AMERICA, S.A. ("HKIL"), unsuccessful defendant and petitioner below, and respectfully submits this response:

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[1] Respondent C-ART, LTD. has no parent or subsidiary company.

STATEMENT OF THE CASE

To the extent C-ART disagrees with HKIL's statement of the case, such differences are reflected in C-ART's discussion of the reasons why the writ should be denied.

SUMMARY OF ARGUMENT

The decision of the Ninth Circuit Court of Appeals does not conflict on any matters of law or fact with any opinion from any other Circuit Court of Appeals. The District Court and Ninth Circuit gave full and fair reviews of all evidence and all issues of the case and properly ruled in favor of C-ART.

HKIL's attempt to seek a review of the twice litigated facts is an improper use of certiorari. Moreover, HKIL's reliance on misplaced and mischaracterized law is inappropriate and misleading. Certiorari, therefore, should be denied.

REASONS FOR DENYING THE WRIT

The writ sought by HKIL should be denied because there is no actual conflict of decisions on the same matter, and, accordingly, no important ground for granting certiorari, and because the Ninth Circuit correctly decided the case on the merits.

"A review on writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10.1. Only when there are special and important reasons will this Court grant a writ of certiorari. Supreme Court Rule 10.1 sets forth the character of reasons that will be considered:

"When a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals *on the same matter* . . . [or] when a United States Court of Appeals . . . has decided a federal question in a way that conflicts with applicable decisions of this Court." [Emphasis added.]

HKIL's petition does not present any of the grounds for granting certiorari described in Rule 10 of the Rules of this Court, and should therefore be denied.

I.

NO CONFLICT EXISTS BETWEEN THE COURT OF APPEALS DECISION BELOW AND THE DECISION OF THE SECOND CIRCUIT.

HKIL asserts that the Ninth Circuit's opinion is in "irreconcilable conflict" with the Second Circuit decision in *National Petrochemical Company of Iran v. M/T STOLT SHEAF*, 930 F.2d 240 (2nd Cir. 1991). However, a review of the Second Circuit opinion in *National Petrochemical* reveals no conflict, and no special or important reasons exist to render this case worthy of further review.

In order to warrant a writ, there must be a "real or intolerable conflict on the same matter of law or fact, and not merely inconsistency in dicta . . ." R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice*, paragraph 4.3 (6th ed. 1986). The conflict relied upon by HKIL arises principally from a remark made in a footnote to the Ninth Circuit's opinion below, 940 F.2d 530 at footnote 4, page 535, stating that in upholding the District Court's findings, the Circuit Court did not condone what appeared to be an admitted disregard of

United States Customs laws. There was no discussion of the issue in the body of the opinion, and the remark was dictum. As the Ninth Circuit expressly stated, "any such violation is a matter for consideration by federal agencies and *not* a matter to be resolved in this appeal." 940 F.2d at 535, fn. 4 [emphasis added].

Moreover, the Ninth Circuit opinion below and the Second Circuit opinion do not address the same matters of law or fact and are factually distinguishable. In the present case, C-Art brought an action for misdelivery against HKIL, an ocean carrier, based on HKIL's misdelivery of goods to the buyer without the buyer having surrendered the properly endorsed, original bills of lading as was required by the express terms of the bills of lading. The District Court found HKIL liable for misdelivery, and HKIL appealed to the Ninth Circuit. Applying well-established principles of maritime law, the Ninth Circuit unequivocally agreed with the District Court that bills of lading are contracts of carriage, as such are to be strictly construed against the carrier, and affirmed the judgment of the District Court.[2]

Relying on the principals set forth in a Second Circuit opinion, *Allied Chem. International Corp. v. Cia. De Nav. Lloyd Brasileiro*, 775 F.2d 476 (2d Cir. 1985), the Ninth Circuit concluded that the ocean carrier, the issuer

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[2] The Ninth Circuit opinion is fully in accord with cases from other circuits, including *Interocean S.S. Corp. v. New Orleans Cold Storage and Warehouse Company, Ltd.*, 865 F.2d 699, 703 (5th Cir. 1989); *Allied Chem. International Corp. v. Companhia De Navegacao Lloyd Brasileiro*, 775 F.2d 476, 482 (2d Cir. 1985) (citing *The Caledonia*, 157 U.S. 124, 137 (1895); *West India Indus. v. Tradex*, 664 F.2d 946, 951 n.9 (5th Cir. 1981); *Mitsui and Company v. American Export Lines*, 636 F.2d 807, 822-23 (2d Cir. 1981); *E. Gerli and Co. v. Cunard S.S. Co.*, 48 F.2d 115, 116 (2d Cir. 1931 (L. Hand, J.)), *cert. denied*, 475 U.S. 1099 (1986).

of the bill of lading, is responsible for releasing cargo only to the party who presents the original bill of lading, stating "if the carrier delivers the goods to one other than the authorized holder of the bill of lading, the carrier is liable for misdelivery, resulting in a prima facie . . . conversion of the goods and a breach of contract." 940 F.2d at 533.

Applying this well-established law to the facts, the Ninth Circuit found that there was no dispute that the express terms of the bill of lading required surrender prior to delivery of the goods, and there was no dispute that HKIL delivered the goods without surrender of those bills of lading. Accordingly, the Ninth Circuit affirmed the District Court's ruling, finding HKIL liable to C-Art for misdelivery of the goods. 940 F.2d at 533.

Distinguishable on its face is the Second Circuit opinion in *National Petrochemical.* In that case, a wholly owned corporation of the Iranian government, NPC, brought an action against a tanker and its owners and operators to recover for the diversion and resale of chemicals shipped from the U.S. to Iran, after the imposition of trade embargoes by Executive Order. On appeal to the Second Circuit, NPC sought reversal of the District Court's summary judgment, claiming that the contracts sought to be enforced were not illegal, that there was a factual issue as to whether appellant was *in pari delicto* with regard to any illegality, and claiming that the District Court had abused its discretion by denying a motion to vacate the judgment.

Although the facts showed that the chemicals being shipped were diverted and resold to the wrong parties, the Second Circuit held that (1) appellant's agreements to purchase chemicals could not be enforced in a United States court based on imputed knowledge of the illegal nature of the agreements by virtue of a principal-agent

relationship, and (2) appellant's complaint could not be amended after judgment because there was no valid basis to vacate the previously entered judgment. The summary judgment of the District Court was affirmed. *National Petrochemical*, 930 F.2d at 245.

The Second Circuit addressed issues of illegality, *in pari delicto*, and abuse of discretion, all in the context of diversion of goods to wrong parties and trade embargoes. The Court did *not* address any issue of misdelivery based on surrender of goods without properly endorsed bills of lading. Likewise, the Ninth Circuit in the case at bar expressly declined to address any issue of the possible disregard of United States Customs laws. The opinion of the Ninth Circuit properly dealt with a straightforward issue of an ocean carrier's improper delivery of goods in a documentary transaction, and had nothing to do with the illegality of agreements.[3]

Since the Ninth Circuit's opinion below and the Second Circuit opinion in *National Petrochemical* do not concern the same matter, there is no conflict, and no important reason exists for granting certiorari.

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[3] Although HKIL's arguments are without merit, and only a desperate attempt to find grounds to warrant a writ, C-Art is compelled to address HKIL's assertions that C-Art was somehow involved in a scheme to perpetrate a fraud on the U.S. Government. At no time has there been any evidence presented that any scheme existed to defraud anyone. The issue of illegality was never raised, and the Ninth Circuit expressly declined to review this issue.

II.

THE NINTH CIRCUIT CORRECTLY DECIDED THE CASE ON THE MERITS.

A. Fact Canvassing Is Not Proper For Certiorari.

HKIL asserts that the Ninth Circuit decided the case on "illusory and nonexistent facts." Petition, page 11. HKIL attempts to make this Court believe that the Ninth Circuit misunderstood the case, somehow created its own set of facts, and thus misapplied the law.[4]

However, the only real questions HKIL raises in its petition turn on the particular facts of this case alone and are of interest only to the parties to it. In essence, HKIL asks this Court to make a third review of the lengthy trial record to see if it can find what two previous courts have been utterly unable to find — proof that the transactions giving rise to the suit were not documentary transactions. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Moreover, in the realm of factual review and analysis, the rulings of the Courts below are treated with and entitled to great weight. In the present case, HKIL raises only questions that exclusively turn on

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[4] The facts of this case were fully and fairly litigated both at the District Court level as well as in the Ninth Circuit Court of Appeals. The facts HKIL claims prove that the transactions in question were not documentary transactions were, in the words of HKIL "laboriously and repeatedly established at trial." (Petition, page 12.) It is presumed, then, that all relevant facts were taken into consideration by both the District Court and the Circuit Court.

the facts of this case, already twice resolved against HKIL, and without any impact outside the limits of this case. Certiorari, therefore, should be denied.[5]

It must also be noted that HKIL flagrantly mischaracterizes the Circuit Court opinion. For the proposition that the Circuit Court misapplied the law concerning documentary transactions, HKIL asserts that C-Art never lodged any bills of lading with any bank for any purpose. Quoting the Ninth Circuit opinion, HKIL claims that "the Circuit opinion states that 'C-Art attempted to exchange [each bill of lading] for value at [the buyer's] Hong Kong bank.' " Petition, p. 14. Inexplicably, HKIL fails to present the entire sentence in context. The Ninth Circuit's opinion actually reads, "HKIL also argues that *Allied* and *Interocean* are distinguishable because the bill of lading used in this case was not negotiable at the time C-Art attempted to exchange it for value at [the buyer's] Hong Kong bank." 940 F.2d at 533. The Ninth Circuit was actually reiterating, and again rejecting, HKIL's own argument to the Court. This is an example, of which more are discussed below, of HKIL's improper attempt to mislead this Court.

B. No Conflict Exists Between The Ninth Circuit Opinion Below And Either A Prior Decision Of This Court Or Statutory Law.

HKIL further asserts that the Ninth Circuit's decision conflicts with the Uniform Commercial Code, as well as the holding of *Hentz v. The Idaho*, 93 U.S. (23 Wall.) 575, 23 L.Ed. 978 (1877). To reiterate, a conflict

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[5] Prettyman, *Opposing Certiorari in the United States Supreme Court*, 61 Va. L. Rev. 197, 209 (1975).

warranting a writ of certiorari must be "real or intolerable on the same matter of law or fact, and not merely inconsistency in dicta." Stern, *supra*. Again, the conflict here relied upon by HKIL arises solely from a footnote to the Ninth Circuit's opinion, this time footnote 2, 940 F.2d at 533, wherein the Court concludes that HKIL was liable for misdelivery of the goods in its capacity as a bailee. The limited discussion in the footnote is dictum at best, and the Ninth Circuit sustained the judgment on other independent grounds, that HKIL was liable for misdelivery of the goods because it failed to obtain possession of properly endorsed, original bills of lading.

Notwithstanding HKIL's attempt to introduce a new set of facts, it must again be noted that HKIL further mischaracterizes the law upon which it relies. HKIL's argument is based on a defense applicable under Article 7 of the Uniform Commercial Code and the Pomerene Bill of Lading Act, 49 U.S.C. §81, *et seq.*[6] At page 18 of its petition, HKIL cites White and Summers, *Handbook of the Law Under the Uniform Commercial Code*, Section 21-3, page 852 (2d ed. 1980), stating that "a carrier is excused from liability for misdelivery if it delivers to a party that has paramount title." Astonishingly, HKIL fails to quote the very next sentence of that text which states, "It will be recalled that a misdelivery under both the FBLA [The Pomerene Act] and Article 7

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[6] HKIL's reliance upon The Pomerene Act is misplaced. That Act does not apply to bills of lading issued in foreign countries for shipment of goods to the United States; its application is specifically limited to bills of lading issued by common carriers engaged in the transportation of goods between places within the United States or from places in the United States to foreign countries. It has no application here. G. Gilmore & C. Black, *The Law of Admiralty*, p. 95 at 3-3 (2d ed. 1975).

is simply a delivery to a party other than the person entitled to delivery by the terms of the bill of lading."

HKIL also cites Reigert and Braucher, *Documents of Title,* UCC Practice Handbook, Section 3.2.4. (1978) for the same proposition. Taken out of context as it is by HKIL, this text might tend to support HKIL's argument. However, Section 3.4.2. of that text is titled "Misdelivery" and begins "[d]elivery to the wrong person, under the Code as under prior law, would seem to subject the bailee to an absolute liability to the person entitled under the document." The text goes on to give the defense of the bailee in situations of misdelivery — in this context meaning delivery to the wrong person.

HKIL's attempt to assert the existence of a conflict with *Hentz v. The Idaho*, 93 U.S. (23 Wall.) 575, 23 L.Ed. 978 (1877), is equally misplaced and misleading. *Hentz* likewise turned on a carrier's delivery to the wrong person, allowing for the bailee's defense as discussed above. The case at bar, of course, did not involve delivery of goods to the wrong person. HKIL's assertions to the contrary, *Hentz* is not in conflict with the Ninth Circuit opinion in the instant case.

Finally, it must also be noted that HKIL's arguments are not new, as all were presented to, and taken into consideration by, the Ninth Circuit, as described in its opinion. Specifically, the Ninth Circuit stated that "HKIL argues that misdelivery could not have occurred because [the buyer] had title to the goods from the time the goods were delivered to the ship in Hong Kong and therefore had the exclusive and immediate right to possession of the goods upon arrival of the ship in California. This argument is inimical to the express provisions of the bill of lading as well as contradictory to applicable authorities." 940 F.2d at 533. Indeed, were HKIL's contentions accepted by this Court, absurd results would

follow. The logical extension of HKIL's argument is that it could have surrendered the goods with no documentation or proof of ownership by the buyer, and would not be liable under any circumstance because the buyer had paramount title to the goods. According to HKIL's argument, there would be no need for bills of lading or documentary transactions. HKIL's argument to the contrary, in this case, there was a documentary transaction, the bills of lading controlled, HKIL breached the express terms of those bills, and HKIL is therefore liable for misdelivery, as both the District Court and the Ninth Circuit correctly concluded.

CONCLUSION

This case presents no conflict among the Circuits with regard to decisions on the same matter, and the Ninth Circuit Court of Appeals correctly decided this case on its merits. Accordingly, this case is not one which requires the exercise of this Court's extraordinary and discretionary jurisdiction, and HKIL's petition for writ of certiorari should be denied.

DATED: April 2, 1992.

Respectfully submitted,

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